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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-3451

HAVERHILL MANOR, INC.,
PETITIONER,

v.

THE COMMISSIONER OF PUBLIC WELFARE
& another,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

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Constitution

Amendment XIV 2

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RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Petitioner, Haverhill Manor, Inc., respectfully prays that a Writ of Certiorari be issued to the Supreme Judicial Court of Massachusetts to review their final judgment of this case.

Opinion Below

The opinion of the Supreme Judicial Court of Massachusetts, announced on June 4, 1975, is reported in Mass. Adv. Sh. (1975) 1813, 330 N.E. 2d 180 (1975).

A copy is contained herein and annexed as Appendix "A".

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented

1. Whether the respondents' failure to provide the petitioner a post-audit evidentiary hearing prior to determining payments owed to petitioner violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

2. Whether the respondents' failure to allow the petitioner a hearing before its decision to treat the petitioner and three related nursing homes under common ownership as a single entity instead of as individual corporate entities, violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Constitutional Provisions Involved

The Constitutional provision which is relevant to this case, the pertinent text of which is set forth in Appendix "C" attached hereto, is the United States Constitution, Amendment XIV.

Statement of Case

Haverhill Manor, Inc. is a Massachusetts corporation licensed to do business as a nursing home. It furnishes a variety of health care services to eligible persons under programs administered by the Massachusetts Department

of Public Welfare (department) and is thus a "provider of health services". Haverhill Manor receives payments for health services provided pursuant to Massachusetts statutes and in accordance with rules and regulations adopted thereunder.

Haverhill Manor and three other individually incorporated nursing homes (affiliated homes) which also supply health services under the above statutes are wholly-owned subsidiaries of Century Convalescent Centers, Inc. (Century), a Massachusetts corporation. Century, in turn, is a wholly owned subsidiary of Carex International, Inc. (Carex), a Delaware corporation with its principal place of business in Los Angeles, California. Carex, for a management fee, performs accounting, managerial and administrative services for Haverhill Manor and the affiliated homes. All such services are performed, and original financial records are kept, in California.

The rates of payment for the health services provided by Haverhill Manor and the affiliated homes pursuant to the above mentioned programs are prescribed by the Rate Setting Commission (commission) pursuant to Massachusetts statute. For each year, the commission determines an interim rate for each provider of health services based on data from a prior year's operations and on regulations which the commission promulgates. The department makes payments to each provider in accordance with these interim rates. The commission establishes final rates for the year based on actual costs incurred in the provision of health services and verified by a full field audit. The final rate determination may result in an adjustment of the amounts owed a provider for a given year or indicate that the department has overpaid the provider for the year.

Initially, the commission issues interim and final rates without affording the provider notice or opportunity to

be heard. A provider who is "aggrieved" by any interim or final rate may appeal and will receive a full hearing before a hearing officer or a member of the commission. A provider who is aggrieved by a decision of the commission after such hearing may petition for review in the Superior Court for Suffolk County.

The commission established interim rates severally applicable to Haverhill Manor and the three affiliated homes for the years 1968 through 1971. Necessary appeals have been filed, hearings held, and decisions rendered as to these interim rates. Final rates, computed after a full field audit, have been issued for Haverhill Manor and the affiliated homes for the same years. Appeals are pending with respect to the 1970 and 1971 final rates. On the basis of these unilaterally determined final rates for the years 1968 through 1971, the commissioner has determined that Haverhill Manor and the three affiliated homes were overpaid in the years prior to 1973. As a consequence, he has refused to authorize payments to Haverhill Manor for health services rendered in 1973 until the unilaterally determined overpayments have been recaptured and prior to any hearing on said final rates.

The petitioner brought suit for declaratory relief challenging the refusal of the Commissioner of Public Welfare to remit to the petitioner the sums owed Haverhill Manor for the provision of health services during 1973. The petitioner asserted that the administrative procedures employed by the commissioner in reaching his decision to withhold funds were based on unilateral determinations, without prior notice or hearing, and thus abridged its rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petitioner also asserted that the Commissioner's unilateral decision without prior notice and hearing to treat petitioner and three other nursing home corporations as a single corporate

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entity in order to collect past overpayments to the affiliated homes from the monies owed to petitioner abridged its rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The case was reserved and reported, without decision to the full bench by a single justice of the Supreme Judicial Court of Massachusetts. On June 4, 1975, that court ruled against the petitioner on each issue on the grounds that although petitioner was entitled to a due process hearing on its claims, the hearing need not be afforded prior to the Commissioner's exercise of his offset procedure, but could be afforded any time thereafter.

Reasons for Granting the Writ

I. The petitioner contends that this case raises fundamental questions of administrative law and review not heretofore decided by this Court and that these issues are of sufficient importance to warrant this Court to exercise its discretion to hear these issues. The question of whether State payments to health care providers of services may be determined and enforced without prior notice and hearing or without a hearing within a reasonable time thereafter raises a fundamental question of due process of national importance.

II. The decision of the Supreme Judicial Court of Massachusetts is in conflict with decisions of the Miami Division of the United States District Court for the Southern District of Florida in *Coral Gables Convalescent Home* v. *Richardson*, 340 F. Supp. 646 (S.D. Fla. 1972); the United States District Court for the Middle District of Florida in *St. Jude Manor Nursing Home, Inc.* v. *Richarson*, No. 72-681-CIV-J.S. (M. D. Fla. 1972); the United States Court of Appeals for the Fourth Circuit in *Wilson Clinic and Hospital, Inc.* v. *Blue Cross of South Carolina*, 494 F.2d

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50 (4th Cir. 1974); and a single judge of the Superior Court of the Commonwealth of Massachusetts in *Union Mission Nursing Home, Inc.* v. *Stevens* (set forth in Appendix B and decided after the instant *Haverhill Manor, Inc.* decision).

III. The decision of the Supreme Judicial Court of the Commonwealth of Massachusetts is in conflict with the principles laid down in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Sniadach* v. *Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Goss* v. *Lopez*, —— U.S. —— (1975), (January 22, 1975) 43 U.S.L. Week 4181. These cases establish the fundamental principle that where property rights are taken, due process requires an evidentiary hearing before the deprivation or within a reasonable time thereafter.

Conclusion

For the reasons above stated, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUPREME JUDICIAL COURT OF MASSACHUSETTS

HAVERHILL MANOR, INC.
v.
COMMISSIONER OF PUBLIC WELFARE
& another.[1]

Before TAURO, *C.J.*, and REARDON, QUIRICO, HENNESSEY and WILKINS, *JJ.*

TAURO, *C.J.* In this suit for declaratory relief, Haverhill Manor, Inc. (Haverhill Manor) challenges the refusal of the Commissioner of Public Welfare (commissioner) to remit to Haverhill Manor certain sums owed Haverhill Manor for the provision of health services. Haverhill Manor asserts that the administrative procedures employed by the commissioner in reaching his determination abridged its rights under the due process clause of the Fourteenth Amendment to the United States Constitution and under the State Administrative Procedure Act (APA), G.L. c. 30A, and that the commissioner had no legal right to treat Haverhill Manor and three affiliated nursing home corporations as a single corporate entity in order to collect past overpayments to the affiliated homes from money owed to Haverhill Manor. The case comes before us on the reservation and report, without decision, of a single justice of this court.

Briefly, the facts appearing in the parties' statement of agreed facts, which amounts to a case stated, are these. Haverhill Manor, a Massachusetts corporation licensed to do business as a nursing home, furnishes a variety of

[1] The Rate Setting Commission under G.L. c. 7, §§ 30K-30P (see n. 2, *infra*).

health care services to eligible persons under programs administered by the Department of Public Welfare (department) and, as a consequence, is deemed a "provider of health services" under G.L. c. 7, §§ 30K-30P.[2] Haverhill Manor receives payments for health services provided pursuant to G.L. c. 118, 118A, 118C, 118D[3] and 118E, in accordance with rules and regulations adopted thereunder.

Haverhill Manor and three other individually incorporated nursing homes (affiliated homes) which also supply health services under the above statutes are wholly-owned subsidiaries of Century Convalescent Centers, Inc. (Century), a Massachusetts corporation. Century, in turn, is a wholly-owned subsidiary of Carex International, Inc. (Carex), a Delaware corporation with its principal place of business in Los Angeles, California. Carex, for a management fee, performs accounting, managerial and administrative services for Haverhill Manor and the affiliated homes. All such services are performed, and original financial records are kept, in California. The funds of each of the corporations (with the exception of petty cash accounts maintained separately in Massachusetts) are commingled by Carex with its own funds and the funds of its other subsidiaries. The Massachusetts corporations and Carex file consolidated tax returns for Massachusetts and Federal tax purposes. However, Haverhill manor and the affiliated homes have individual identification numbers with the United States Internal Revenue Service and individual vendor numbers with the department.

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[2] The parties refer to these sections. The sections were repealed by St. 1973, c. 1229, effective July 1, 1974, which substituted G.L. c. 6A, §§ 31-36. As G.L. c. 7, §§ 30K-30P, were in effect during the years at issue in this suit, we employ the repealed statutory provisions in the text.

[3] General Laws c. 118D was in effect during the years at issue in this suit but has been repealed by St. 1973, c. 1210, § 24, effective January 1, 1974.

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The rates of payment for the health services provided by Haverhill Manor and the affiliated homes pursuant to the above mentioned programs are prescribed by the Rate Setting Commission (commission) pursuant to G.L. c. 7, § 30L. For each year, the commission determines an interim rate for each provider of health services based on data from a prior year's operations and on regulations which the commission promulgates. The department makes payments to each provider in accordance with these interim rates. The commission establishes final rates[4] for the year based on actual costs incurred in the provision of health services and verified by a full field audit.[5] The final rate determination may result in an adjustment of the amounts owed a provider for a given year or indicate that the department has overpaid the provider for the year. The efforts of the commissioner, acting for the department,[6] to recover overpayments made to Haverhill Manor and the affiliated homes by deducting the amounts of such overpayments from sums owed to Haverhill Manor for services performed in 1973 have given rise to the instant litigation.

Initially, the commission issues interim and final rates without affording the provider notice or opportunity to be heard. A provider who is "aggrieved" by any interim or final rates may appeal and will receive a full hearing before a hearing officer or a member of the commission in accordance with G.L. c. 30A.[7] G.L. c. 7, § 30O. A provider who is aggrieved by a decision of the commission after

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[4] The amended statute provides for determination of preliminary final rates as well. G.L. c. 6A, § 32.

[5] See G.L. c. 6A, § 32.

[6] Pursuant to G.L. c. 18, § 3, the department is under "the direction, supervision and control" of the commissioner.

[7] Under the new statute, G.L. c. 6A, § 36, hearings on appeal are conducted by the division of hearing officers alone.

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such hearing may petition for review in the Superior Court for Suffolk County. See G.L. c. 7, § 300.

The commission established interim rates severally applicable to Haverhill Manor and the three affiliated homes for the years 1968 through 1971. Necessary appeals have been filed, hearings held, and decisions rendered as to these interim rates.[8] Final rates, computed after a full field audit, have been issued for Haverhill Manor and the affiliated homes for the same years. Appeals are pending with respect to the 1970[9] and 1971 final rates. On the basis of these final rates for the years 1968 through 1971, the commissioner has determined that Haverhill Manor and the three affiliated homes were overpaid substantial sums in the years prior to 1973.[10] As a consequence, he has refused to authorize payments to Haverhill Manor for health services rendered in 1973 until the overpayments have been recaptured.[11] The commissioner asserts that he can offset all amounts due to the Commonwealth from Haverhill Manor against amounts owed to Haverhill Manor for 1973. He asserts further that he can offset amounts owed by the three affiliated homes to the Commonwealth against amounts owed to Haverhill Manor for 1973. The commissioner's procedure would preclude any payments to Haverhill Manor until the al-

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[8] None of the homes filed appeals from the 1970 interim rates.

[9] Though the affiliated homes appealed the 1970 final rate determination, Haverhill Manor did not.

[10] Payments were, of course, predicated on the relevant interim rates.

[11] At the time the instant proceeding was commenced, a sum in excess of $2,800 was owed to Haverhill Manor by the Commonwealth and the department for 1973. A preliminary order of the single justice stated that the parties appeared to agree that "the combined or net adjustment for all prior fiscal periods is a credit in favor of" Haverhill Manor and instructed the commissioner to authorize payment of this sum owed for 1973. Subsequently, the commission issued final rates for 1971. The commissioner then calculated that Haverhill Manor had received almost $30,000 in excess of the amounts to which it was entitled.

leged overpayments have been recovered by the Commonwealth.

In the instant proceeding, Haverhill Manor contests the commissioner's right to utilize his offset procedure. Haverhill Manor presents four specific objections: It alleges that (1) the decision to offset overpayments against current amounts due to Haverhill Manor constitutes a regulation, as that term is defined in the APA, G.L. c. 30A, § 1(5), and was improperly promulgated and implemented without a hearing; (2) the commission's failure to provide a post-audit evidentiary hearing concerning the final rate for 1971 [12] before the commissioner commenced the offset procedure denied Haverhill Manor due process of law under the Fourteenth Amendment; (3) the commissioner's deduction of alleged overpayments to the affiliated nursing homes from amounts owed to Haverhill Manor for services rendered in 1973 violated Haverhill Manor's rights under the due process clause of the Fourteenth Amendment because no prior hearing had been convened to give Haverhill Manor an opportunity to defend the separateness of the corporate entities involved; and (4) the commissioner, generally, had no legal right to treat the affiliated homes and Haverhill Manor as a single entity for the purpose of collection of past overpayments.

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[12] The statement of the issue in Haverhill Manor's brief *arguably* imports a somewhat broader conception of the issue than that presented in this opinion. In its brief, Haverhill Manor predicates its procedural due process claim on the fact that the "respondents" did not afford Haverhill Manor the requested hearing before "determining . . . monies owed by petitioner to respondents." In the light of the bill for declaratory relief and the substance of Haverhill Manor's arguments, we construe this statement as a request for a post-audit pre-action evidentiary hearing to consider evidence concerning final rates. Haverhill Manor has not challenged the commissioner's determinations of amounts actually paid in the past and, we believe, does not claim a right to an evidentiary hearing on the subject of these determinations.

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1. Haverhill Manor contends that the decision to offset the alleged overpayments against sums owed to Haverhill Manor for services rendered in 1973 is a regulation within the meaning of the APA, G.L. c. 30A, § 1(5), and that, consequently, the "regulation" is invalid because timely notice and a fair hearing did not precede its issuance and implementation. We disagree. The decision to offset is not a "rule, regulation, standard or other requirement of *general application* and future effect" (emphasis supplied). G.L. c. 30A, § 1(5), inserted by St. 1954, c. 681, § 1 (see amendments by St. 1969, c. 808, § 2; St. 1970, c. 712, § 2). Rather, it appears from the record that the offset is an administrative expedient undertaken to recover overpayments made in one *specific* case. We have before us no indication that the commissioner proposes to adopt this method generally in the future or that the procedure is proposed as a rule or standard of conduct. Accordingly, the decision to offset is not a "regulation," and the provisions of the APA relative to notice and hearings are inapposite. Cf. *Department of Pub. Health* v. *Cumberland Cattle Co.*, Mass. , (1972).

2. Despite the absence of express statutory authorization, we believe that the commissioner may legally offset current obligations against past overpayments. Under G.L. c. 18, § 5E, any vendor who receives payment under any assistance program administered by the department must return overpayments or erroneous payments to the State Treasurer on demand. The offset procedure expeditiously recaptures funds owed to the Commonwealth without necessity for demand or court proceedings. "[M]ultiplicity of suits and circuity of action are avoided." *Wisconsin Cent. R.R.* v. *United States*, 164 U.S. 190, 211 (1896). Similar procedures have repeatedly been upheld by the Federal courts. See, e.g., *Gratiot* v. *United States*, 15 Pet.

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[a] Mass. Adv. Sh. (1972) 1031, 1040.

336, 370 (1841); *Wisconsin Cent. R.R.* v. *United States, supra; Grand Trunk Western Ry.* v. *United States,* 252 U.S. 112, 121 (1920); *Rains* v. *United States,* 312 F.2d 764, 767 (Ct. Cl. 1963); *Wilson Clinic & Hosp. Inc.* v. *Blue Cross of S. C.,* 494 F.2d 50, 52 (4th Cir. 1974); *Russi* v. *Weinberger,* 373 F. Supp. 1349, 1352 (E. D. Va. 1974). Cf. *United States* v. *New York, N. H. & H. R.R.,* 355 U.S. 253, 261 (1957).

Further, the financial relationship between the department and Haverhill Manor appears analogous to a relationship between other parties doing business which would create a "mutual and open account current" or a simple "running (open) account." In either case and, by extension, in this case, one party owes the other party only the balance in the account at the particular time, and charges by each may satisfy charges by the other. The balance owed by either is computed by setting off charges against favorable items. See *Penniman* v. *Rotch,* 3 Met. 216, 219 (1841); *Eldridge* v. *Smith,* 144 Mass. 35, 36 (1887); *Snell* v. *Rousseau,* 257 Mass. 559, 561-562 (1926) (open [running] account); *Howland* v. *Stowe,* 290 Mass. 142, 147 (1935); *Markiewicz* v. *Toton,* 292 Mass. 434, 437 (1935); *Boston* v. *Nielsen,* 305 Mass. 429, 431 (1940). See, generally, Corbin, Contracts, § 953 (1951) (running account); anno. 45 A. L. R. 3d 446 (mutual and open account current). In the instant case, Haverhill Manor continually provides services for which the commissioner makes payment at the interim rates. The value of the services is subject to adjustment in the final rate-making procedure. As the parties undoubtedly realize, the adjustment may indicate that Haverhill Manor was overpaid previously. Thus, at any given time, Haverhill Manor may either be owed money for services provided or owe money as restitution for past overpayments. It would seem most consistent with the statutory scheme, the understanding of the parties,

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and efficient administration to offset the commissioner's overpayments against amounts owed to Haverhill Manor for new services and, by so doing, to reach a balance in the account in favor of the commissioner until the overpayments have been recaptured.

3. As noted above, the commissioner has reduced payments to Haverhill Manor for health services supplied in 1973 by the amount of alleged overpayments to Haverhill Manor in 1971 and preceding years. Haverhill Manor contends that this offset procedure deprives it of due process of law guaranteed under the Fourteenth Amendment because the offsets preceded any hearing on the question whether overpayments had, in fact, occurred. Again, we disagree.

We do not question that Haverhill Manor has shown a property interest which is cognizable under the due process clause. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state laws — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Regents of State Colleges* v. *Roth*, 408 N.S. 564, 577 (1972). Accord, *Arnett* v. *Kennedy*, 416 U.S. 134, 151 (1974) (plurality opinion), reh. den. 47 U.S. 977 (1974). See, e.g., *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Under the law of the Commonwealth, Haverhill Manor had a valid claim of entitlement to the 1973 payments. It had provided health services in accordance with the law and was entitled to receive reimbursement under the interim rate for 1973 then in effect. Delay in receipt of the reimbursement deprived Haverhill Manor of the use of the funds during the period of delay. The use of the funds, itself, is a property interest which may not be taken by the Commonwealth without due process of law. *Sniadach* v. *Family Fin. Corp. of Bay View*, 395 U.S. 337, 342 (1969) (Harlan, J., con-

curring). Note, The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 74, n. 21 (1974). See, e.g., *Fuentes* v. *Shevin*, 407 U.S. 67, 84-86 (1972), reh. den. 409 U.S. 902 (1972); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, U.S. , (1975).[b] Thus, though Haverhill Manor may ultimately receive the payments for health services extended in 1973 because of a favorable outcome in hearings conducted on its appeal of the 1971 final rate, even the temporary deprivation of the payments must conform to the demands of due process. It is well settled that "a temporary, non-final deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment." *Fuentes* v. *Shevin*, 407 U.S. 67, 85 (1972), reh. den. 409 U.S. 902 (1972).

To say that Haverhill Manor has a property right protected by the due process clause does not in any way determine what process constitutes "due process" in the circumstances. Due process is a protean concept which imports different procedures in different situations or circumstances. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation . . . . [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Wkrs. Union Local 473, AFL-CIO* v. *McElroy*, 367 U.S. 886, 895 (1961), reh. den. 368 U.S. 869 (1961). Accord, *Goldberg* v. *Kelly*, 397 U.S. 254, 263 (1970); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 610 (1974); *Fusari* v. *Steinberg*, U.S. , (1975).[c] Ordinarily, a hearing should precede deprivation of liberty and property by the State.

[b] (January 22, 1975) 43 U. S. L. Week 4192, 4193.
[c] (January 14, 1975) 43 U. S. L. Week 4121, 4124.

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Fuentes v. *Shevin,* 407 U.S. 67, 88 (1972), reh. den. 409 U.S. 902 (1972). See *Morrissey* v. *Brewer,* 408 U.S. 471, 484 (1972). However, "there are recurring situations in which prior notice and hearing cannot be insisted upon. . . . In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable." *Goss* v. *Lopez,* U.S. , (1975),[d] quoted in *O'Hara* v. *Commissioner of Pub. Safety,* Mass. , (1975).[e] Postponement of notice and hearing has been held consistent with due process in cases where summary administrative action, prior to hearing, was necessary to protect the public from contaminated food (*North American Cold Storage Co.* v. *Chicago,* 211 U.S. 306 [1908]), from misbranded drugs (*Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U.S. 594 [1950]), from rapidly rising rents in wartime (*Bowles* v. *Willingham,* 321 U.S. 503 [1944]), and from bank failures (*Coffin Bros. & Co.* v. *Bennett,* 277 U.S. 29 [1928], *Fahey* v. *Mallonee,* 332 U.S. 245 [1947]). Courts have repeatedly held that, to sustain the orderly functioning of government and safeguard the integrity of the public purse, tax officials may assess and collect taxes before vouchsafing the taxpayer a right to hearing and judicial review as to the legality of the assessment. See *Old Colony R.R.* v. *Assessors of Boston,* 309 Mass. 439 (1941); *Lincoln Hotel Co.* v. *Assessors of Boston,* 317 Mass. 505 (1945); *Canron, Inc.* v. *Assessors of Everett,* Mass. , - (1975);[f] *Phillips* v. *Commissioner of Int. Rev.,* 283 U.S. 589 (1931). In a recent case, the United States Supreme Court upheld seizure of a yacht before notice and hearing because, inter alia, such seizure precluded removal of the yacht from the jurisdiction and consequent frustration of the interests

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[d] (January 22, 1975) 43 U.S. L. Week 4181, 4186.
[e] Mass. Adv. Sh. (1975) 990, 1000-1001.
[f] Mass. Adv. Sh. (1975) 81, 87-88.

served by the statute authorizing seizure. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974), reh. den. 417 U.S. 977 (1974).

Given the aforementioned legal background, we do not believe the offset procedure adopted by the commissioner with respect to the pre-1973 overpayments to Haverhill Manor violated Haverhill Manor's right to due process of law. Summary action serves the same substantial governmental purpose served in the cited tax cases — preservation of the integrity of the public purse. Payments to Haverhill Manor, if they were made in spite of the preliminary findings of the field audit, would deplete the public treasury to the extent of the payments in the face of a real possibility that no money was owed to Haverhill Manor. We will not, in this case, require the commissioner to disburse funds prior to a definitive finding of entitlement. It is neither economical nor prudent to have the Commonwealth expend funds with the knowledge that legal action may be required to recover the money in the future. This is particularly true when, as here, the pyramidal ownership structure of the corporate family to which Haverhill Manor belongs and the location of the commingled corporate bank accounts suggest that such legal action might take place in the courts of another State.

We cannot say that Haverhill Manor's interest in prehearing receipt of the funds is sufficient to overcome the commissioner's interest in pursuing this expeditious procedure. Haverhill Manor has presented no evidence of potential harm [13] beyond the bare, allegedly temporary deprivation of the use of property. In a reply brief, Haverhill Manor has asserted that reductions of current pay-

[13] Haverhill Manor has not shown that the commissioner will deny Haverhill Manor interest on withheld funds if Haverhill Manor and the affiliated homes are ultimately successful in their appeals of the final rate determinations.

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ments will engender reductions of patient services and, perhaps, closing of the nursing home. Without supporting evidence of impending insolvency, this assertion is little more than a veiled threat that patients will suffer if the Commonwealth does not capitulate.[14] From the record we cannot say that, if Haverhill Manor's claim for adjustment of the rate for 1971 has merit, Haverhill Manor will have difficulty finding funds to maintain its solvency and operations.[15] If Haverhill Manor's claim has no merit, Haverhill Manor is not entitled to further payments and should carry on with the financing of the overpayments.

Haverhill Manor argues that *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), requires a holding that it is entitled to a pre-offset hearing. However, *Goldberg* does not have the expansive effect urged. The outcome in *Goldberg* turned on the fundamentality of welfare payments to recipients and the necessity for continued payments if minimal subsistence was to continue. In view of potential hardship to eligible people whose welfare payments might have been suspended, the governmental interest in not disbursing funds to the ineligible could not justify refusal to grant a pre-termination evidentiary hearing. Mr. Justice Brennan explained the court's holding: "It is true, of course, that

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[14] A similar claim was advanced in a recent Federal case, in which pre-hearing suspension of Medicare payments to a provider of health services because of alleged past overpayment was challenged. The court responded: "... [T]he plaintiffs in this case continue to be credited for services rendered and such credit will remain irrespective of the outcome of this dispute. The only question is whether amounts credited to plaintiffs will ultimately be offset against amounts allegedly owning by them. If not, payments owing to plaintiffs will be made. Thus, there is no reason to believe that discontinuance of Medicare services by these plaintiffs is inevitable. This, coupled with the availability of Medicare services from other sources, renders the possible adverse effect on recipients insufficient and inappropriate for this Court to upset the administratively constructed grievance procedure by requiring a pre-action hearing." *Russi* v. *Weinberger*, 373 F. Supp. 1349, 1353 (E. D. Va. 1974).

[15] See n. 13, *supra*.

some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process . . . . For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. . . . Thus the crucial factor in this context — a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose government entitlements are ended — is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." *Id.* at 263-264.

Haverhill Manor's need is in no way comparable to the "brutal need" (see *Russi* v. *Weinberger,* 373 F. Supp. 1349, 1352 [E. D. Va. 1974]) of the welfare recipients. It opposes its bare claim to tangible property, similar to that of the "blacklisted government contractor" or "taxpayer denied a tax exemption" (*Goldberg* v. *Kelly, supra*), to the legitimate need of the government for expeditious offset. "Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." *Phillips* v. *Commissioner of Int. Rev.,* 283 U.S. 589, 596-597 (1931). *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600, 611 (1974). See *Marshall House, Inc.* v. *Rent Control Bd. of Brookline,* 358 Mass. 686, 706-707, n. 12 (1971). The statute accords Haverhill Manor the full panoply of due process rights to review of the 1971 final rate. See G.L. c. 7, §300.[16] Cf. *Coral Gables Convalescent Home, Inc.* v. *Richardson,*

[16] These rights to review are continued in G.L. c. 6A, § 36.

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340 F. Supp. 646, 650 (S. D. Fla. 1972). If Haverhill Manor's claim to higher final rates is vindicated in the hearings or on subsequent judicial review, and if the commissioner has no other items to offset against payments due for 1973, Haverhill Manor will be entitled to immediate payment of the amounts due for 1973.

4. Finally, Haverhill Manor argues, without further citation of authority, that the decision to offset alleged overpayments to the affiliated nursing homes against payments owed Haverhill Manor for health services rendered in 1973 denied Haverhill Manor due process of law under the Fourteenth Amendment. Haverhill Manor contends that it was entitled to a hearing before the commissioner proceeded to treat the group as one corporation.[17] Again, we disagree.

Haverhill Manor's argument here suffers from the same infirmities as the previously discussed due process argument. Haverhill Manor raises a simple claim of property deprivation which cannot stand before the Commonwealth's clear interest in recovering overpayments expeditiously. As we have noted above, in such circumstances, the Commonwealth may postpone the hearing on the merits and need not afford Haverhill Manor a pre-offset hearing. Haverhill Manor has access to forums in which it will receive a constitutionally adequate hearing after, or concurrently with, implementation of the commissioner's decision to offset alleged overpayments to the affiliated nursing homes against payments owed to Haverhill Manor.

It is true that Havehill Manor cannot challenge the commissioner's decision through the procedures provided in G.L. c. 7, § 300,[18] or the APA. The statutory procedure

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[17] Cf. *Lexington Nursing Home, Inc.* v. *Rate Setting Commn.*, 358 Mass. 601, 602-603 (1971).

[18] Since the repeal of G.L. c. 7, § 300, these procedures have been set forth in G.L. c. 6A, § 36.

for immediate administrative appeal and subsequent judicial review pursuant to G.L. c. 7, § 300, is available *only* for challenges to actions of the commission. The APA provisions applicable to "adjudicatory proceedings" (G.L. c. 30A, §§ 10, 14) are similarly inapposite, since in the instant circumstances a hearing is not "required by constitutional right[19] or by any provision of the General Laws" (G.L. c. 30A, § 1 [1]). See *School Comm. of Boston* v. *Board of Educ.*, 352 Mass. 693, 701 (1967), app. dism. for want of a substantial Federal question, 389 U.S. 572 (1968). As we held previously (p.)[g] the offset decision is not a regulation subject to hearing and appeal under G.L. c. 30A, §§ 3, 7.

Nevertheless, Haverhill Manor does have a statutorily granted right to an adequate hearing regarding the merits of the commissioner's offset determination. Haverhill Manor could have brought a bill for injunctive and declaratory relief pursuant to G.L. c. 231A. "It is settled that a suit for declaratory relief will lie to challenge the legality of an administrative action even though such action is neither an 'adjudication' nor the promulgation of a 'rule,' provided that the other requirements of maintaining such a suit can be met." *Westland Housing Corp.* v. *Commissioner of Ins.*, 352 Mass. 374, 383 (1967). Accord, *South Shore Natl. Bank* v. *Board of Bank Incorporation*, 351 Mass. 363, 366 (1966). The offset decision of the commissioner raises a definite question and creates an "actual controversy" (G.L. c. 231A, § 1) cognizable under G.L. c. 231A. See *Franklin Fair Assn. Inc.* v. *Secretary of the Common-*

[19] Because we find the declaratory judgment procedure constitutionally adequate, we perceive no constitutional right to an adjudicatory proceeding under the APA. Cases such as *Milligan* v. *Board of Registration in Pharmacy*, 348 Mass. 491, 498-499 (1965), and *Marmer* v. *Board of Registration of Chiropractors*, 358 Mass. 13, 16-17 (1970), are distinguishable on their facts.

[g] Mass. Adv. Sh. (1975) at 1820.

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wealth, 347 Mass. 110, 113 (1964). In a declaratory judgment proceeding, Haverhill Manor would receive a plenary judicial hearing of the factual and legal bases for its grievance.[20] The availability of this hearing satisfies the constitutional requirement that some opportunity for a hearing must be afforded before the deprivation of property becomes final. See *Associated Indus. of Mass.* v. *Commissioner of Ins.*, 356 Mass. 279, 285 (1969); *Phillips* v. *Commissioner of Int. Rev.*, 283 U.S. 589, 595 (1931); *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 612 (1974).

5. Although, as we have held here, Haverhill Manor may bring a suit for declaratory relief to challenge the commissioner's treatment of the affiliated homes and Haverhill Manor as a single corporation, we do not reach the *merits* of this challenge in this suit as it is currently before us. We believe that the affiliated nursing homes are necessary parties to a declaratory proceeding on the merits. General Laws c. 231A, § 8, inserted by St. 1945, c. 582, § 1, provides that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration." It is plain that the affiliated homes have an interest which would be affected by a declaration on the merits. In a practical sense, the declaration would determine the method by which the commissioner could recapture past overpayments and, for the future, would define the financial relationships among the commissioner, Haverhill Manor and the affiliated homes without opportunity for the affiliated homes to participate. Moreover, justice requires that the affiliated homes be bound[21] by the declaration on the

[20] Haverhill Manor may also be able to challenge the commissioner's determination in a contract action.

[21] Of course, a finding that the affiliated homes and Haverhill Manor may be treated as one corporation would not bind the affiliated homes if they were not joined as parties. See *Leventhal* v. *Krinsky*, 325 Mass. 336, 340 (1950).

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merits so that they are not left free to raise and litigate the same issues with Haverhill Manor and the commissioner in a different action at a later date.[22] See *Sadler* v. *Industrial Trust Co.*, 327 Mass. 10, 13 (1951).

6. Haverhill Manor is not now entitled to the precise relief sought in its petition. However, as in every case where the proceeding is properly brought under G.L. c. 231A, it is entitled to a decree declaring the rights of the litigants. *Vasilakis* v. *Haverhill*, 339 Mass. 97, 101 (1959). *Hannan* v. *Enterprise Publishing Co.*, 341 Mass. 363, 365 (1960). See *Gibbs Realty & Inv. Corp.* v. *Carvel Stores Realty Corp.*, 351 Mass. 684, 686 (1967). Further, in the circumstances, we deem it appropriate to afford Haverhill Manor an opportunity to litigate the merits of its challenge to the treatment of the affiliated homes and Haverhill Manor as a single corporation without pleading afresh.

The case is remanded to the county court. The single justice is to enter an interlocutory decree declaring that the challenged offset procedures initiated by the commissioner were not violative of the due process clause of the Fourteenth Amendment or the State Administrative Procedure Act, G.L. c. 30A. The single justice shall retain jurisdiction of the case. Haverhill Manor is given leave within thirty days of rescript to take the necessary procedural steps to join the affiliated homes as parties. If, within that time, Haverhill Manor joins the affiliated homes as parties in the suit for declaratory relief, the single justice may (a) conduct proceedings regarding the legality of commissioner's treatment of the affiliated homes and Haverhill Manor as a single corporation and thereafter enter such judgment as is appropriate, or (b) in his discretion, transfer the case to the Superior Court for such proceedings. If Haverhill Manor does not join the affili-

[22] Such an action might yield an inconsistent judgment on the merits.

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ated homes within the allotted time or does not seek declaratory relief on this issue, the single justice shall enter a judgment not inconsistent with this opinion.

So ordered.

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APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. SUPERIOR COURT
No. 2618

UNION MISSION NURSING HOME, INC.
v.
JERALD L. STEVENS, As He Is
COMMISSIONER OF PUBLIC WELFARE OF
THE COMMONWEALTH OF MASSACHUSETTS
and
THE RATE SETTING COMMISSION OF THE
COMMONWEALTH OF MASSACHUSETTS

MEMORANDUM AND ORDER

This matter is before the court on plaintiff's motion for interlocutory relief pursuant to Rule 65 of the Mass. Rules of Civil Procedure. The facts are before the court by way of a certified complaint and affidavits of Donald Taylor, President of Union Mission Nursing Home, Inc.; Eugene E. Tillock, the Administrator of the nursing home; and the defendant, Jerald L. Stevens.

The plaintiff is a charitable corporation which operates a facility at 150 Water Street in Haverhill, for the care of infirm and convalescent persons. The plaintiff is a "provider of health services" within the purview of G.L. c. 6A, §§31-36.

The dispute between the parties involves the disputed balance between the interim and final rate set for the period January 1 to December 31, 1972. and the period between January 1 and May 31, 1974. The amount in controversy is $133,781.37.

The Department has informally proposed allowing the plaintiff one year to repay this amount. This would mean

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a repayment of approximately $11,140.00 per month. An examination of a cash flow chart attached to the affidavit of the plaintiff's administrator indicates that a reduction of $11,000. per month would seriously affect plaintiff's present ability to remain in business.

The plaintiff claims that the final rate set by the Rate Setting Commission is less than the cost to the plaintiff of maintaining patients for whose payment a governmental unit of the Commonwealth is responsible. The defendant asserts that there has been an overpayment.

The plaintiff has claimed a timely appeal from the decision of the Rate Setting Commission. That appeal is now pending before the Division of Hearings Officers within the Executive Office for Administration and Finance of the Commonwealth of Massachusetts.

During the appeal process the plaintiff seeks to enjoin the defendant from collecting, by way of offset, the money which the Commissioner alleges the plaintiff owes.

In its affidavits the plaintiff attempts to demonstrate that if the defendant is not enjoined from implementing its offset collection procedure, there is a substantial possibility that the plaintiff nursing home would be unable to continue in business and the plaintiff will lose its entire investment.

The affidavits also establish that the Department of Public Welfare is owed approximately $11,000,000 (eleven million dollars) by various nursing homes, due to the retroactive rate determinations made by the Rate Setting Commission. The defendant has sent 25 (twenty-five) letters, and intends to send 50 (fifty) more, to nursing homes, informing them of the amount due to the Department and the terms of repayment. In other words, the Department intends to offset the debt from any future payments if there is not a timely reply.

The defendant argues that its offset procedure is proper and causes the plaintiff no legal injury, citing *Haverhill Manor, Inc.* v. *Commissioner of Public Welfare,* Mass. Adv. Sh. (1975) 1813. Moreover, the defendant contends, the procedure is an "internal agency management practice" and as such is not a "regulation" within the meaning of G.L. c. 30A.

This court would concur with the defendant if it were clear "from the record that the offset is an administrative expedient undertaken to recover overpayments made in one *specific* case, or indeed, in a small and special group of cases" (Emphasis in original). *Haverhill Manor, Inc.* v. *Commissioner of Public Welfare,* supra at 1820.

However, the record in this case is substantially distinguishable from *Haverhill Manor, Inc.*

It is apparent from the record before this court that the Commissioner has adopted the offset procedure "to implement . . . . the law enforced or administered by it" within the definition of a "Regulation" under G.L. c. 30A, §1. Furthermore, the record indicates that the offset procedure in this case could do substantial harm to the plaintiff unless reasonable steps were taken to extend the offset period. There was no supporting evidence for such a finding in *Haverhill Manor, Inc.,* supra at 1823-29. Haverhill Manor, Inc. was a wholly-owned subsidiary of a Delaware corporation with its principal place of business in California. It could not be said that ". . . . Haverhill Manor . . . . [would] have difficulty finding funds to maintain its solvency and operations." *Haverhill Manor, Inc.,* supra at 1829.

Unquestionably, the Commonwealth has the right, under G.L. c. 18, §5E, to recover payments made under public welfare programs to recipient "providers" who received overpayments because of an excessive interim rate. However, the procedure by which the right is exercised should

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be dependent upon the factual circumstances of each case. This court, with the very limited record before it, has a concern that the offset procedure universally applied and with a demand for immediate payment of claimed overpayments, could well lead to a number of nursing homes being forced out of business.

In this case, the plaintiff has a substantial right or interest which is directly jeopardized by the Department's administrative action. This interest should entitle the plaintiff, and others similarly situated, to have the defendant establish a rule making policy for the recoupment of overpaid funds.

The advantage of carefully drawn rules and regulations in these situations is apparent. Just and appropriate procedures could be developed administratively and duly aggrieved petitioners would be significantly diminished. In this way, the courts would be relieved of complex problems which most often can be better solved in another forum.

The Department has the capacity to obtain meaningful input from all interested parties, while, on the contrary, the court is necessarily limited by the specific record presented by adversaries in litigation.

This is not to suggest that rules and regulations will alleviate all problems faced by providers of health services. In such limited areas as might arise when substantial injury and injustice are done, the courts remain available. However, this forum should be reserved for exceptional situations when reasonable rules and regulations, reasonably administered, still may cause injustice to the plaintiffs and harm to the public.

As a matter of public policy, not only for the concern of nursing homes but also to patients as well as to prospective patients, the Department should set forth a workable rule-making policy. This policy should contain objective criteria that will provide eligible nursing homes with some

insight as to how and when repayments and overpayments will be scheduled, so as to be not overburdensome or confiscatory.

It is in the very nature of the relationship between the parties that services must be continually supplied even where no final amount remains undecided. It is foreseeable that a significant debt may develop when the rate has been finally determined. Even such a legitimate debt could endanger a healthy business when the effect of immediate payment is to substantially destroy a healthy cash flow.

Pending such rule-making policy by the Department of Public Welfare, the defendant is restrained from using the offset procedure on the alleged debt against any payments the plaintiff may be entitled to under G.L. c. 6A, §§31-36.

(s) JOHN PAUL SULLIVAN
Justice of the Superior Court

Date: 7-17-'75

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APPENDIX C

SELECTED PROVISIONS OF THE U. S. CONST.

AMENDMENT X [1791]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States specifically, or to the people.

AMENDMENT XIII [1865]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV [1870]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

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